

Stephen M. Dichter, 004043
sdichter@cdslawfirm.com
Justin R. Vanderveer, 037657
jvanderveer@cdslawfirm.com
CHRISTIAN DICHTER & SLUGA, P.C.
2800 North Central Avenue, Suite 860
Phoenix, Arizona 85004
Telephone: (602) 792-1700
Facsimile: (602) 792-1710

Attorneys for Defendant David Harbour

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

David Allen Harbour,

Defendant.

Case No. 2:19-cr-00898-DLR (DMF)

**MOTION TO RECONSIDER
RULING RE DISCLOSURE OF
EXPERT WITNESS EMAILS**

(Hon. Douglas L. Rayes)

Defendant David Allen Harbour, (“Defendant”) by and through his attorneys, submits this Motion to Reconsider an Order issued from the bench regarding providing witness communications. The background is that the government demanded the email communications between Dr. Robert Manning and the undersigned.

The government cited a case that the Court declined to follow but, without announcing the citation on the record, cited to a case that it believed was applicable to the situation after having, the Court stated, Rules 16 and 26 of the Criminal Rules. As Dr. Manning was put-on out of order in the government’s case, this matter was quickly decided.

1 Now, the government has demanded to see all the communications between all of
2 Harbour's lawyers and Cathie Cameron, a defense expert witness noticed in Doc. 95,
3 filed on June 15, 2020.

4
5 Consistent with the Court's view on discovery of expert materials, the Court first
6 directed the Defense to file a Summary of its Experts Opinions. This was done in Doc.
7 629 filed February 17, 2023. Thereafter, the Court directed that the Defense file the
8 original notices of experts. These are Documents 52 (government) and 95 (defense) and
9 a statement as to how it came to pass that drafts were prepared and why they were
10 prepared when they were prepared. As to this requirement, the Defense raises no issue.
11 The summary and the table of contents of the drafts are being filed today.

12
13 However, respectfully, the Court's order that the emails between Dr. Manning and
14 the undersigned be disclosed was erroneous and, if the Court orders that the emails and
15 attachments between Cathie Cameron and the undersigned and the prior attorneys be
16 supplied, the error will be magnified exponentially.

17
18 Rule 16.1(a)(1)(G) governs discovery with respect to the government's expert
19 witnesses.
20

21 **(G) Expert Witnesses.**

22 **(i) Duty to Disclose.** At the defendant's request, the government must disclose to
23 the defendant, in writing, the information required by (iii) for any testimony that the
24 government intends to use at trial under [Federal Rule of Evidence 702](#), [703](#), or [705](#) during
25 its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely
26 disclosed under (b)(1)(C). If the government requests discovery under the second bullet
27 point in (b)(1)(C)(i) and the defendant complies, the government must, at the defendant's
28 request, disclose to the defendant, in writing, the information required by (iii) for
testimony that the government intends to use at trial under Federal Rule of Evidence
702, 703, or 705 on the issue of the defendant's mental condition.

1 **(ii) Time to Disclose.** The court, by order or local rule, must set a time for the
 2 government to make its disclosures. The time must be sufficiently before trial to provide
 a fair opportunity for the defendant to meet the government's evidence.

3 **(iii) Contents of the Disclosure.** The disclosure for each expert witness must
 contain:

- 4 • a complete statement of all opinions that the government will elicit from the
- 5 witness in its case-in-chief, or during its rebuttal to counter testimony that the defendant
- 6 has timely disclosed under (b)(1)(C);
- 7 • the bases and reasons for them;
- 8 • the witness's qualifications, including a list of all publications authored in the
- 9 previous 10 years; and
- 10 • a list of all other cases in which, during the previous 4 years, the witness has
- 11 testified as an expert at trial or by deposition.

12 **(iv) Information Previously Disclosed.** If the government previously provided a
 13 report under (F) that contained information required by (iii), that information may be
 14 referred to, rather than repeated, in the expert-witness disclosure.

15 **(v) Signing the Disclosure.** The witness must approve and sign the disclosure,
 unless the government:

- 16 • states in the disclosure why it could not obtain the witness's signature through
- 17 reasonable efforts; or
- 18 • has previously provided under (F) a report, signed by the witness, that contains
- 19 all the opinions and the bases and reasons for them required by (iii).

20 **(vi) Supplementing and Correcting a Disclosure.** The government must
 supplement or correct its disclosures in accordance with (c).

21 **(2) Information Not Subject to Disclosure.** Except as permitted by Rule
 22 **16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection**
 23 **of reports, memoranda, or other internal government documents made by an**
 24 **attorney for the government or other government agent in connection with**
 25 **investigating or prosecuting the case. Nor does this rule authorize the discovery or**
 26 **inspection of statements made by prospective government witnesses except as**
 27 **provided in 18 U.S.C. § 3500. [Emphasis Added]**

28 The Rule applicable to the Defendant is Rule 16.1(b)(1)(C)

29 **(C) Expert Witnesses.**

30 **(i) Duty to Disclose.** At the government's request, the defendant must disclose to
 31 the government, in writing, the information required by (iii) for any testimony that the
 32 defendant intends to use under Federal Rule of Evidence 702, 703, or 705 during the
 33 defendant's case-in-chief at trial, if:

- 34 • the defendant requests disclosure under (a)(1)(G) and the government complies;
- 35 or
- 36 • the defendant has given notice under Rule 12.2(b) of an intent to present expert
- 37 testimony on the defendant's mental condition.

1 **(ii) Time to Disclose.** The court, by order or local rule, must set a time for the
 2 defendant to make the defendant's disclosures. The time must be sufficiently before trial
 to provide a fair opportunity for the government to meet the defendant's evidence.

3 **(iii) Contents of the Disclosure.** The disclosure for each expert witness must
 4 contain:

- 5 • a complete statement of all opinions that the defendant will elicit from the
 witness in the defendant's case-in-chief;
- 6 • the bases and reasons for them;
- 7 • the witness's qualifications, including a list of all publications authored in the
 previous 10 years; and
- 8 • a list of all other cases in which, during the previous 4 years, the witness has
 testified as an expert at trial or by deposition.

9 **(iv) Information Previously Disclosed.** If the defendant previously provided a
 10 report under (B) that contained information required by (iii), that information may be
 referred to, rather than repeated, in the expert-witness disclosure.

11 **(v) Signing the Disclosure.** The witness must approve and sign the disclosure,
 unless the defendant:

- 12 • states in the disclosure why the defendant could not obtain the witness's signature
 through reasonable efforts; or
- 13 • has previously provided under (F) a report, signed by the witness, that contains
 all the opinions and the bases and reasons for them required by (iii).

14 **(vi) Supplementing and Correcting a Disclosure.** The defendant must
 15 supplement or correct the defendant's disclosures in accordance with (c).

16 **(2) Information Not Subject to Disclosure. Except for scientific or medical
 reports, Rule 16(b)(1) does not authorize discovery or inspection of:**

17 **(A) reports, memoranda, or other documents made by the defendant, or the
 defendant's attorney or agent, during the case's investigation or defense; or**

18 **(B) a statement made to the defendant, or the defendant's attorney or agent,
 by:**

- 19 **(i) the defendant;**
- 20 **(ii) a government or defense witness; or**
- 21 **(iii) a prospective government or defense witness. [Emphasis Added]**

22 When the Court quizzed Defense counsel as to the basis for our contention that
 23 disclosure of the emails and drafts were not required, we cited back to the Rule itself.

24 Under Rule 16, there is no question that communications between counsel and
 25 counsel's expert nor the drafts are required to be produced. Therefore, neither the emails
 26 and drafts sent to and from Cathie Cameron and to the lawyers who engaged her nor her
 27
 28

1 draft reports are subject to disclosure under this Rule any more than the government's
2 materials are discoverable.

3 Thus, only if Rule 26.2(b) trumps Rule 16 are the emails and drafts producible.
4
5 We contend that Rule 26.2 does protect the emails and drafts from production.

6 **(c) Producing a Redacted Statement.** If the party who called the witness claims
7 that the statement contains information that is privileged or does not relate to the subject
8 matter of the witness's testimony, the court must inspect the statement in camera. After
9 excising any privileged or unrelated portions, the court must order delivery of the
10 redacted statement to the moving party. If the defendant objects to an excision, the court
must preserve the entire statement with the excised portion indicated, under seal, as part
of the record.

11 The defense's position is that Rule 16 (b)(1)(C) makes the emails and drafts the
12 government wishes to see privileged from disclosure altogether. First, Rule 16 protects
13 them from disclosure by its own language.

14
15 The section of Rule 16 pertaining to expert disclosure discusses experts in terms of
16 they being witnesses in the trial; not merely as consulting experts during the
17 investigation. The Rule protects from disclosure expert materials created during both the
18 investigation *and* the prosecution when created by the government. For the defense, the
19 Rule protects from disclosure expert materials created during both the investigation and
20 the defense. Therefore, it is clear that Rule 16 does trump Rule 26.2.

21
22 Secondly, the Court's order, if the Court persists in requiring the disclosure, will
23 result in a complete breach of the attorney-client privilege that exists between the
24 Defendant and all of his lawyers and a complete breach of the attorney work-product
25 privilege that exists between the Defendant, his lawyers, and the expert witness.
26
27
28

1 The provisions of Rule 16 discussed herein would be meaningless were it to make
 2 available to the opposite party under Rule 26.2 exactly that which Rule 16 meant to
 3 protect from disclosure in both directions.
 4

5 The Court's prior ruling, which is not embodied in an order or minute entry, is
 6 erroneous and needs to be fixed. We will, of course, bring the emails to court and hand
 7 them to the government after Cathie Cameron's direct examination just as we expect that
 8 the government will hand the defense all the emails between Ms. Paige and any and all
 9 other government personnel after she has completed her direct examination. This is a bell
 10 that, once rung, cannot possibly be un-rung. The breach of privileges being ordered by
 11 the Court, if the Court is found to have erred, will render the case not prosecutable except
 12 by those who have never seen or heard of what will be produced.
 13

14
 15 RESPECTFULLY SUBMITTED this 21st day of February 2023.

16 CHRISTIAN DICTER & SLUGA, P.C.
 17

18 By: /s/ Stephen M. Dichter

19 Stephen M. Dichter

20 Justin R. Vanderveer

21 2800 North Central Avenue, Suite 860

22 Phoenix, Arizona 85004

23 Attorneys for Defendant David A. Harbour
 24

25 **CERTIFICATE OF SERVICE**

26 I hereby certify that on February 21, 2023 I electronically transmitted the attached
 27 document to the Clerk's Office using the CM/ECF system for filing and for transmittal
 28 of Notice of Electronic Filing to the following CM/ECF registrants:

Kevin M. Rapp

Kevin.rapp@usdoj.gov

1 Coleen Schoch
2 Coleen.schoch@usdoj.gov
3 U.S. Attorney's Office
4 40 N. Central Avenue, Suite 1800
5 Phoenix, AZ 85004
6 Attorney for Plaintiff

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
/s/ Yvonne Canez